No. 75-1376

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, and INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Prudential Insurance Company of America ("Prudential") petitions for a writ of certiorari to review a judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered on February 12, 1976, which granted enforcement to a November 23, 1974, order of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the Court of Appeals, appears in 78 LC at ¶ 11251. The Decision and Order of the Board are reported at 215 N.L.R.B. No. 30. The Regional Director's Decision and Direction of Election, and

the Board's Certification of Representative, are unreported. The above opinions, decisions and orders all appear in the Appendix.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Sixth Circuit was entered on February 12, 1976. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1), and Section 10(e) of the National Labor Relations Act, as amended 29 U.S.C. 160(e).

QUESTIONS PRESENTED

1. Whether a union may, in an effort to influence the outcome of an election, offer employees, during an organizing campaign, a financial inducement which if offered by an employer would be unlawful under the National Labor Relations Act, as amended?

2. Whether the holding of the Court of Appeals approving a bargaining unit of seven clerical employees of a nationwide insurance company having a highly regionalized, centralized labor policy squarely conflicts with the requirement established by *Pittsburgh Plate Glass Co.* v. *Board,* 313 U.S. 146 (1941), that bargaining units effectuate the National Labor Relations Act's policy of efficient collective bargaining?

STATUTORY PROVISIONS INVOLVED

The statute involved is the National Labor Relations Act, as amended 29 U.S.C. § 151, *et seq.* Pertinent provisions of Sections 7, 8(a)(1) and (a)(5), 8(b)(1), 9(b) and 9(c)(1)(A) are set forth in Appendix A hereto, pp. 1a-3a, *infra.*

STATEMENT OF THE CASE

The Board Proceedings:

On December 12, 1973, following a hearing and decision[1] on Prudential's challenge to the appropriateness of a unit consisting only of the seven clerical employees at Prudential's Grosse Pointe, Michigan, district office, a representation election was held in which IWIU prevailed. No objections were filed to the election since during the short time period for filing objections Prudential was not in possession of evidence of improper post-representation petition conduct on the part of IWIU. IWIU was therefore certified as the bargaining representative of the Grosse Pointe clerical employees and, on January 18, 1974, requested collective bargaining.

By letter of February 15, 1974, Prudential refused to bargain since that was its only means of obtaining judicial review of its challenge to the appropriateness of the unit. In addition, Prudential shortly before that date had first learned of IWIU's general practice of offering a financial inducement as a means of gaining votes in representation elections. This general practice was disclosed in testimony by an IWIU official on February 5, 1974, during an NLRB hearing relating to an election among clerical employees at Prudential's Chartiers district office in the Pittsburgh area.[2] The

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[1] The decision on the appropriateness of the bargaining unit was made by an NLRB Regional Director, pursuant to delegated authority. Prudential requested review of this decision by the Board itself, but its request was denied.

[2] Prior to that time, Prudential had been unaware that IWIU followed a general practice of offering financial inducements in campaigning for votes in NLRB representation elections. Shortly after the Chartiers' election, Prudential had been informed by clerical employees at the Pittsburgh area office that, *inter alia,* a

union official testified as to IWIU's general practice regarding waiver of payment of dues and initiation fees by persons voting in NLRB elections.

Following an unfair labor practice charge by IWIU,[3] the General Counsel of the Board, by the Regional Director for Region 7, issued a complaint[4] alleging that Prudential had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 8(a)(5) and Sections 2(6) and (7) of the National Labor Relations Act, as amended, by refusing to bargain with IWIU. Prudential's answer contested the charge and sought a hearing on the newly discovered evidence of financial inducements.

Over Prudential's opposition, the proceeding was transferred to the Board which, in an opinion on November 22, 1974, rejected Prudential's argument, and found that Prudential had violated Sections 8(a)(1) and 8(a)(5) of the Act by refusing to bargain with IWIU and ordered it to so bargain.[5]

On November 29, 1974, Prudential filed a timely petition to review and set aside the Board's order of

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financial inducement had been offered to them and Prudential promptly filed timely objections to that election. At that time, however, Prudential had no knowledge that this was a general practice or that it had occurred at the Grosse Pointe district office.

[3] The charge was filed March 6, 1974.

[4] The complaint issued March 12, 1974.

[5] Accordingly, no hearing was held on the waiver issue, and there is no evidentiary record with respect to the exact terms of the waiver extended by IWIU. Since the issue was decided on summary judgment, however, the allegations in Prudential's answer to the unfair labor practice complaint regarding the terms of the waiver must be taken as true.

November 22, 1974. The Court of Appeals decided that the Board's order should be enforced. The Court found that the Grosse Pointe district office had "the degree of autonomy" necessary to support the finding of an appropriate bargaining unit. Rejecting Prudential's argument that the policy of *NLRB* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973), invalidated the election by reason of IWIU's pre-election offer of an across-the-board waiver of initiation fees to the clerical employees, the Court found *NLRB* v. *S&S Engineering Services, Inc.*, 513 F.2d 1311 (6th Cir. 1975), dispositive. Such a waiver, *S&S* held, was not coercive and would not influence an election.[6]

Statement Of Facts:

1. Prior Bargaining History.

Since 1949, IWIU or a predecessor has been the collective bargaining representative for district agents employed by Prudential in a single bargaining unit embracing district offices in 34 states, the District of Columbia, and the City of Toledo, Ohio. Numerous collective bargaining agreements have been entered into between IWIU and Prudential with respect to District Agents since 1949.[7]

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[6] Prudential believed that it was entitled to a hearing to ascertain the facts regarding the pre-election waiver offered by IWIU. The Board's reasons for not granting a hearing were: (1) any objection to an election based on newly discovered evidence must be filed within the time period that otherwise applies to objections, (2) Prudential had not demonstrated that its newly discovered evidence could not have been discovered earlier and (3) in any event the challenged waiver was not proscribed by *Savair*. The Court of Appeals' opinion addressed only the third argument.

[7] Recently, IWIU was certified by the Board as the collective bargaining representative for District Agents in two additional district offices of the Company, as separate units, located in Nevada

2. The Centralized Organizational Structure of the Company.

The territory served by Prudential in the United States and Canada is divided among nine regional home offices which are the primary administrative units of the Company. The North Central Regional Home Office (NCHO) encompasses the states of Michigan—including the Grosse Pointe district office—Wisconsin, Minnesota, North Dakota, South Dakota, Nebraska and Iowa and is responsible for all sales and service efforts within those states. NCHO is headed by a Senior Vice President, a Vice President, and by various functional vice presidents of sales, administration and group insurance. NCHO has three sales regions, each having 16 district offices.[8] Each sales region is headed by a Director of Agencies who reports to the NCHO Vice President-Sales in charge of district agency sales.

A district office is a small, clearly subordinate unit of the Regional Home Office. District offices have two functions: the sales of insurance and the servicing of transactions regarding policyholders. Each district office has a district manager, a number of sales managers and about 39 district agents.[9] In addition, located

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and Arizona. No separate negotiations were held with respect to those district offices; it was agreed that the overall collective bargaining negotiations would apply.

[8] Overall, Prudential has slightly more than 500 district offices in the United States.

[9] The district agents are primarily responsible for the sales functions of the company. They report to the sales manager and to the district manager. A sales manager is responsible generally for seven to eight district agents.

in a typical district office are an office manager, an associate office manager, and about eight office and clerical employees. The Grosse Pointe district office has only seven.

Responsibility for and control of all significant decisions affecting the office and clerical staff is centralized in the Regional Home Office through various devices. The Regional Home Office has a Field Clerical Personnel Division which is specifically responsible for the administration and implementation of overall Company personnel policies in NCHO with respect to its office and clerical employees.[10] The Field Clerical Personnel Division, through Field Office Consultants, has direct contact with the office managers and the clerical staff and maintains a regular liaison with the various district offices with respect to the implementation of personnel policies, the pay, promotion, transfer and discipline of district office clerical employees.

The Field Clerical Personnel Division also maintains liaison with the NCHO Agencies Administration Division. The latter performs complementary functions. It has responsibilities for field office planning functions, the leasing of field offices, and for the Field Office Consultants who act as inspectors general over the district office clerical staff.

The field office planning staff in NCHO determines the location and the amount of space that will be occupied by each district office. It also negotiates for the lease of office space and makes arrangements for its maintenance, pays the rent for district office quarters, determines the physical layout of the district office, and

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[10] The field clerical personnel are the office and clerical employees in the district offices.

the kinds and amounts of furniture that will be provided. It is responsible for the maintenance and repair of furniture and equipment, except that a district manager is authorized to approve costs for repairs under $25.

Similarly, the size of the staff of office and clerical employees in any district office is not determined by the district managers or office managers. The actual staffing is arrived at through discussions between the Regional Home Office and the Corporate Home Office on the basis of a reasonably flexible formula developed by the Corporate Home Office.[11] The actual size of an office staff, which frequently varies from its allotted size, is determined by the Regional Home Office.

Nor are pay levels determined in the district office. The Corporate Home Office, following input from the Regional Home Office and discussions with it as to proposed salary levels, establishes each year various salary levels for application throughout the country. The Regional Home Office then decides which salary level is to apply to each district office within its territory.[12]

NCHO is also the primary repository of employee records. Paychecks for office and clerical employees

[11] The Regional Home Office develops the basic facts and statistics for application of the staffing formula—facts such as the volume of business processed in the office, types of transactions, etc., and may suggest variations in the size of an office that would be produced by the formula. Its recommendations are given great weight and deferred to by the Corporate Home Office.

[12] Requests by district offices for an upgrading of salary levels are not routinely granted; of two such cases in recent history, one was granted and one was denied, both *after* thorough Regional Home Office investigation and review.

are issued from the NCHO.[13] The personnel records of these employees are also maintained there. Similarly, periodic pay increases are initiated by NCHO. See pp. 16-17.

The authority and responsibility of the management personnel of the district office are sharply circumscribed by a system of manuals promulgated by NCHO which are binding upon them. Most important of these is the Field Clerical Personnel Manual, a two-hundred page document which spells out company policy in all areas of the employment relationship for office and clerical employees. The Manual, for example, determines company policy and practice with regard to employment, induction of new employees, training, development and selection of employees for promotion, employee morale, discipline and grievances, salary plan and job classifications, vacations, absences, absenteeism and tardiness, overtime, safeguarding company funds, transfers, resignations, disability, leaves of absence, records of time worked and temporary clerical employees.

The Manual is binding upon the district office; neither the District Manager nor the Office Manager has authority to change it or definitively to interpret it. The NCHO has authority to interpret the Manual and to authorize deviations.

There is also a five-volume set of manuals relating to field clerical procedures which spell out in detail the manner in which all of the daily job tasks of field clerical personnel are to be performed.

[13] Unlike office and clerical employees, agents are not paid by the Regional Home Office but by the district office.

Altogether, the net effect of the manuals is to prescribe uniform policies for operation of the district offices and to confine narrowly the discretion of the District Manager and the Office Manager with respect to clerical personnel. There is virtually no autonomy at the district office level with regard to clerical personnel.

The limited supervisory role of the district office with respect to clerical personnel is reinforced by a system of audits and reviews by representatives of the Regional Home Office. At least once a year, for example, personnel in the Field Audit Group, which operates out of the Regional Home Office, visit each district office and audit all activity of a financial nature. The general objectives of the audit are to uncover improper activities and to see that the company rules relating to accounting and control are observed.

Field Office Consultants play an important role in maintaining Regional Home Office liaison with and supervision over the field service personnel. The Field Office Consultant's responsibility is to evaluate and report on the level of morale, the quality of supervision, the condition of work of the clerical staff, to provide advice and guidance respecting clerical procedures and to determine whether Company personnel policies and rules are being observed.

On visits, which last a week on the average, the Consultant reviews the progress of members of the office clerical staff, discusses with them salary and promotion matters and generally reviews these matters and the morale of the staff with the Office Manager and Associate Office Manager. The Consultant also suggests improvements in procedures to the Managers and assists in training. Consultants are required to visit each office once a year but usually do so more frequently. In addition, Office Managers or District Managers frequently request assistance or advice from the Consultants on various matters, including promotions. The Consultant's advice on candidates for promotion is also solicited by Regional Home Office personnel who decide on promotions. Likewise, the Consultant acts as a clearinghouse with respect to transfers and vacancies.

The Field Office Consultant also prepares an Annual Survey reporting on staffing, training, supervision, conditions of work, morale and physical appearance of the office. This report is circulated to officials at the Regional Home Office—the Director of Agencies, the Agency Administration Division, and other personnel at NCHO.

An important supervisory and review function over the district office is also carried out by the Director of Agencies who is a resident official of the Regional Home Office, with responsibility for the district and detached offices within each region of the Regional Home Office. The Director oversees sales promotion, development of the company's sales personnel and the orderly operation of the company's business.

The Director typically spends half of each week in the Regional Home Office and the remaining half in visits to each of the district offices. On visits, the Director meets with the District Manager to review the overall progress of the district office, discusses particular questions and problems, reviews files, meets with the sales force, meets with other members of management, and goes over the status of the clerical staff with

the District Manager and Office Manager. The Field Office Consultant's report is utilized by the Director in reviewing clerical operations. Often during a visit, questions, problems, or grievances involving clerical employees are brought up and the Director endeavors to resolve them on the spot if possible and if not, works on them at the Home Office.

Problems also are brought to the Director's attention at the Regional Home Office. These may include the pick-up of mail by clerical employees, promotions, application of equal employment opportunity standards, and equipment needs.

The Director and/or his staff is involved in all major actions affecting clerical employees, including additional hiring or replacement hiring, promotions, and salary increases. Any recommendation for discharge would be reviewed and resolved by the Director. Requests for new equipment by district offices are forwarded for decision by the Director and are not routinely granted. The Director, in consultation with the Sales Vice President, decides upon district office realignments, closings and openings, as well as employee transfers. Finally, if a complaint from a customer is forwarded to the Regional Home Office, the Director would be responsible for resolving it.

3. Clerical Employees Perform Standardized Interchangeable Jobs.

There are only three categories of office and clerical employees: Service Assistant (FA); Service Representative (FB); and Senior Service Representative (FC). The entry level position is the Service Assistant. From Service Assistant, an employee progresses to Service Representative and then to Senior Service Representative. *There is no difference between the functions performed by a Service Assistant or a Service Representative or a Senior Service Representative in one district office and the functions performed by those personnel in any other district office.*

There is also a substantial degree of employee interchange. Transfers occur both at employee request and at Company request. Office and clerical employees have been transferred from one district office to another to accommodate their wishes, as, for example, in cases of marriage. Transfers are made to meet Company needs (*e.g.*, transfers to add staff to a particular district office, to provide assistance in clearing up backlogs, transfers for promotions, and transfers relating to territorial reorganization of district offices in various regions). Each of these types of transfers has occurred within NCHO. Even within the two years preceding the NLRB hearing in this case, the small Grosse Pointe clerical unit (seven employees) had a substantial record of transfer—two clerical employees transferred there from the Woodward district office.

The interchangeability of job positions among district offices and the significant degree of employee interchange also reflect the relative territorial instability of the district office, especially as compared to the Regional Home Office. Although the geographical territory encompassed by the NCHO is the same as when it was established in 1953, this is not the case of either the district offices or the Regions within NCHO.

In July 1972, for example, as part of a general realignment of district offices in the Detroit Metropolitan area, nine districts in the Detroit area were consolidated into eight districts, various district boundary lines were changed, and agencies serving one par-

ticular type of market were consolidated under one roof. Two districts were ultimately eliminated and one new one was created. As a result of this reorganization, the number of agencies (district agent territories) assigned to the Grosse Pointe office increased by three, some territory was transferred out of the office to the newly created Woodward district (serving the inner city) and other territory which was considered suburban or metropolitan was transferred into the Grosse Pointe office. Also, as a result, the number of clerical employees in that office was increased by one.

4. Exchange of Work Between District Offices and the Regional Home Office, and Among District Offices.

There is a regular, recurring exchange of information, policies, money, and forms, and other contacts between district offices and the Regional Home Office and among district offices. The Grosse Pointe district office, for example, functions as a "transfer district." Other offices in and out of Michigan send it correspondence, transfer forms, and similar materials, and it, in turn, sends these to other offices. Mail of this nature is sent and received every day, and there is also frequent telephone contact with other district offices.

There are also frequent calls and written contacts with the Regional Home Office—several calls a day back and forth and a constant volume of mail. The district office clericals also prepare and send to the Regional Home Office various forms, such as daily cash balance reports, the ordinary pay report (reflecting premium payments and notices), underwriting applications, a weekly production report, claim forms and new business reports. Altogether this amounts to constant contact with the Regional Home Office.

Moneys received by a district office, and not used in the Manager's account as described below are cleared to the Regional Home Office several times a week. Only enough cash is deposited in the Manager's account to cover the checks written on it for transfers of payments to other offices, the payment of postage, refunds and payments to policyholders, agents' salaries and minor expenses. The balance of collections is deposited daily in another account which, strictly speaking, is an account of the Regional Home Office maintained in a local bank. Funds are cleared from this account and remitted to the Regional Home Office several times weekly.

5. Regional Home Office Control of the Employment Relationship.

The district office does not make decisions on the hiring of new employees. When a vacancy occurs, the district office must first obtain permission from NCHO to fill the vacancy. Such permission is not perfunctorily granted.[14] Although the District Manager has authority to recruit and interview prospective employees, the standards of selection, the methods to be employed, application forms and tests, and the criteria for evaluation are all spelled out in detail in the Field Clerical Personnel Manual which is binding on the district office. Once a decision is made to recommend a particular applicant, the application papers with a recommendation for employment are sent to the Regional Home Office for approval.

The salary of all office and clerical employees, new or otherwise, is centrally determined by NCHO or the

[14] In Grosse Pointe, permission to fill a vacancy has been denied within the past two years.

Corporate Home Office. NCHO makes a determination of the appropriate salary for a particular office and clerical job classification by specifying which of the various rate ranges reflecting varying area cost-of-living adjustments is to be applicable.[15]

The procedure for salary increases is yet another illustration of centralized control in the Regional Home Office of all matters of significance to office and clerical employees. Salary increases are the primary responsibility of the Regional Home Office, with the district office given only an advisory role. At specified intervals,[16] salary increases are scheduled and approximately four to five weeks before the date of a scheduled increase, a listing is sent from the Regional Home Office to the district office indicating the intended increase. The Office Manager, after discussion with the District Manager, notes on the form whether or not the increase is recommended, or should be deferred. In the ordinary course of things, increases are expected to be recommended and are recommended. In the rare cases when a District Manager recommends against an increase, or recommends deferral, an explanation must be sent to the Regional Home Office. The Regional

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[15] Rates are adjusted on the basis of information developed by Field Office Consultants and salary surveys by the Regional Home Office, but the district offices have no part in this process.

[16] Employees are given length-of-service salary increases at 6, 12, 18 and 24 months after employment and annually thereafter, except that employees hired as Office Managers and Associate Office Managers are not eligible for an 18 month increase. There are also special provisions applicable to the rehiring of former employees.

Home Office then reviews the recommendation and decides whether to adopt it.[17]

Although the Office Manager has the primary responsibility for training office and clerical employees in the performance of their duties, little or no discretion is involved because job duties are standardized, and Company training manuals spell out the procedures to be followed, as well as the method of instruction. For clericals, for example, there is a five-volume set of procedures running at least 700 pages which set out and describe all of the tasks that office clericals are to perform, how they are to do each job they do, and how each company-supplied form is to be used. The Regional Home Office, through the Field Office Consultant, reviews and supervises the training of office and clerical employees.

In similar fashion, decisions to promote are made in the Regional Home Office. Although the district office may recommend a promotion, the criteria are established by the Regional Home Office and there is review by the Regional Home Office of the application of those criteria in each district office, most commonly through the reports and other communications of the Field Office Consultant. The responsibilities and duties of each job classification are specified in the Field Clerical Personnel Manual. The procedure for promotions is also specifically delineated there.

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[17] The criteria for each of the categories of proposed salary action—increase recommended, deferral or increase not recommended—are set forth precisely in the Field Clerical Personnel Manual. The system of liaison, instruction and close supervision minimizes problem cases calling for anything other than the customary approval of increases.

The framework established for grievances, discipline, and termination is in keeping with that established with respect to other major aspects of the employment relationship. Authority to take significant action resides only in the Regional Home Office. Only routine minor day-to-day matters are resolved by the District Manager, or the Office Manager. An employee, however, cannot be suspended, terminated or formally disciplined except by the Regional Home Office.[18]

The procedure with respect to grievances is similar. The Manual authorizes the District Manager to settle grievances or inquiries by employees. Employees' grievances or inquiries which cannot be resolved in the district office are referred to the Personnel Division. The District Manager may dispose of routine day-to-day minor matters, but if a matter involves Company policy or a major problem or a matter which the Office Manager feels unable to resolve without additional guidance or information, the matter is referred to the Personnel Director, Field Office Consultant, or other persons in the Regional Home Office.

REASONS FOR GRANTING THE WRIT

1. The Holding of the Court Below and Those of Other Courts of Appeals Conflict With the Policy of Sections 7, 8(b)(1) and 9(c)(1)(A) of the National Labor Relations Act and This Court's Holding in Savair

Little more than two years ago in *NLRB* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973), this Court

[18] Disciplinary action does not occur often but when it is necessary, the authority to take it resides in the Regional Home Office. The Office Manager of the Grosse Pointe district office, for example, testified that she never wrote a letter regarding discipline or took any other disciplinary action with respect to the clerical staff in her office.

held that a union's offer to waive initiation fees for all employees who signed authorization cards before a representation election was proscribed because it conflicted with rights established by Sections 7 and 9(c)(1)(A) of the National Labor Relations Act. This case presents an issue closely related to but not explicitly decided by *Savair*. Once again, the issue involves a waiver of initiation fees as well as dues in the context of a representation election but a waiver not limited *per se* to those who sign before the election. In the instant case the union apparently[19] promised Prudential's clerical employees, prior to the representation election, that it would waive the normal initiation fees and dues until a successful contract was negotiated and signed.

Since *Savair* the National Labor Relations Board—sustained by six Courts of Appeal, including the one below—has approved such waivers, relying in large part on language in note 4 of *Savair*. Judging by the numerous Board[20] and Court[21] cases that have resulted,

[19] See note 5, p. 4, *supra*.

[20] See e.g., L. D. McFarland Co., 219 N.L.R.B. No. 103 (1975); Western Refrigerator Co., 213 N.L.R.B. No. 40 (1974); Irwindale Division, Lau Industries, 210 N.L.R.B. No. 42 (1974).

[21] *See* N.L.R.B. v. Dunkirk Motor Inn, 90 L.R.R.M. 29961 (2d Cir. 1975); Thrift Drug v. N.L.R.B., 521 F.2d 243 (5th Cir. 1975); *petition for cert. filed*, 44 U.S.L.W. 3445 (U.S. Jan. 27, 1976) (No. 75-1063); N.L.R.B. v. Bancroft Mfg. Co., 516 F.2d 436 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3467 (U.S. Feb. 23, 1976); N.L.R.B. v. Benner Glass Co., 514 F.2d 641 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3398 (U.S. Jan 12, 1976); N.L.R.B. v. S & S Product Engineering Services, Inc., 513 F.2d 1311 (6th Cir. 1975) *enforcing*, S & S Product Engineering Services, Inc., 210 N.L.R.B. No. 107 (1974); Altman Camera Co. v. N.L.R.B., 511 F.2d 319 (7th Cir. 1975); N.L.R.B. v. Wabash Transformer Corp.,

vote getting waivers have become widely used in organizing campaigns and have apparently replaced those held unlawful in *Savair*. Accordingly, a determination by this Court as to the validity of the kind of waiver here involved is important both to the ongoing administration of the National Labor Relations Act and to maintain the integrity of *Savair's* basic principles.

Most significantly, the results of the Board's interpretation of *Savair* encroach upon the equality of the obligations placed on both employers and unions by the Taft-Hartley Act. A fundamental purpose of the Act was to equalize the obligations placed on employers and unions with regard to interference with Section 7 rights, including the right—first explicitly defined by the Taft-Hartley Act—to refrain from union activity. The surely unintended result of Note 4 in *Savair* and post-*Savair* waiver cases has been to upset this balance—to permit unions vastly greater latitude than employers not only in promising but actually conferring economic benefits in return for votes. Thus, a fundamental question of Taft-Hartley Act policy is posed.

Note 4 in *Savair* has been read narrowly by the Board as applying only to waivers of fees limited to the pre-election period. The Board has ruled that a pre-election promise of benefits in the form of a waiver of initiation fees and dues not so limited serves a legitimate union interest and does not unduly influence

509 F.2d 647 (8th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3201 (U.S. Oct. 6, 1975); N.L.R.B. v. Con-Pac, Inc., 509 F.2d 270 (5th Cir. 1975); N.L.R.B. v. Stone & Thomas, 502 F.2d 957 (4th Cir. 1974); Fort Smith Outerwear, Inc. v. N.L.R.B., 499 F.2d 223 (8th Cir. 1974).

the representation choice of employees. *See, e.g., Irwindale Division, Lau Industries,* 210 N.L.R.B. 182, 185 (1974). And unions have followed this cue in phrasing waivers of fees and dues.[22]

That a waiver of fees and dues, however phrased, is a financial benefit is not really open to question. The benefit consists of the payments that the union would otherwise have required, pursuant to its Constitution and By-Laws, following the signing of authorization cards. It is immaterial that the financial benefit is extended to all rather than some employees. The point is that a concrete *quid pro quo* is offered for votes, and this cannot help but influence the minds of voters.

No one would suggest, for example, that an employer could validly forgive existing employee indebtednesses to a company conditioned on the employer not being required to enter into a union contract—regardless of whether the forgiveness extended to indebtedness incurred only before an election or both before and after. In either case, forbearance would operate as a financial benefit calculated to influence the election. It would thus impair the opportunity for free choice.

The Board's reading of *Savair* has been to legitimatize union use, in the sensitive pre-election context, of one form of economic inducement for support. While

[22] Western Refrigerator Co., 213 N.L.R.B. No. 40 (1974) (no initiation fees or dues for those joining "now during this campaign", *held*, not proscribed by *Savair*); S & S Product Engineering Services, Inc., 210 N.L.R.B. No. 912 (1974) (waiver of initiation fees and no collection of dues until an agreement is negotiated and approved); *see also*, cases cited *supra* p. 19, n. 21; but *see*, Coleman Co., 212 N.L.R.B. No. 129 (1974) (initiation fees for all employees who make application for charter membership *held*, proscribed by *Savair*).

this is troublesome solely in terms of the well-established policy against such inducements, *NLRB* v. *Exchange Parts Co.*, 375 U.S. 405 (1964), it has an even broader impact because it upsets the statutory balance between employers and unions. The creation of such a balance was a fundamental purpose of the Taft-Hartley Act,[23] expressed in but not limited to Section 8(b)(1). Indeed, the core concern of the sponsors of what became Section 8(b)(1) was to impose on union organizing tactics the same legal restraints that employers were subject to. Its purpose was, in the words of its Senate sponsor:

> "simply to provide that where unions, in their organizational campaigns, indulge in practices, which, if an employer indulged in them, would be unfair labor practices, such as making threats or false promises or false statements, the unions also shall be guilty of unfair labor practices" (*Legislative History* at 1018).

As another of the sponsors of this Section said: "[t]he only intent is to prevent restraint or coercion by a labor organization or by employers, and we think the

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[23] The caption of the Act states that one of its purposes is "to equalize legal responsibilities of labor organizations and employers." The House Bill as reported contained language to the same effect as 8(b)(1) but the Senate Bill as reported to the full Senate did not. Such language was added by amendment during the floor debates. (National Labor Relations Board, Legislative History of the Labor Management Relations Act, 1947, at 52-3, 112, 1018, 1216-17) (1948) ("Legislative History"). By far the fullest discussion of the purpose of what became 8(b)(1) is contained in the Senate Debates (*see, e.g., id* at 1021-33, 1138-44, 1181-82, 1188-1209), but the purpose of both Houses was the same (*see, e.g., id* at pp. 297, 373, 456.)

rules should be the same for one side as for the other" (*Legislative History* at 1205).[24]

Taft-Hartley's policy of equality of restraint against both employers and unions would be thwarted if it were narrowly limited to unfair labor practice cases as distinct from representation cases. The Congressional concern that both "sides" be subject to the same rules requires setting aside elections where unions employ campaign tactics which, if engaged in by an employer, would mandate a new election. It is no answer that unions may lawfully promise to obtain economic benefits for employees in collective bargaining. Such promises can be evaluated by employees in the give and take of a campaign. They are obviously far different in character than a present outright financial benefit. Indeed there is no difference in logic between forgiveness of dues and fees by a union and payment by it of $10 or $20 or $50 to each employee as a means of getting their votes.

It is likewise no answer that a union might amend its constitution to eliminate provisions for the payment of dues or fees before contracts are signed. This facet of the problem was touched on in note 4 of *Savair* in suggesting that a union waiver of dues or fees might be prompted by employer campaign arguments that employees were being asked by the union to buy a pig in a poke. Yet nothing prevents a union from responding to such campaign argument with other campaign argument, or by amending its Constitution so that there

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[24] The debates on this Section contain extensive references to union use of tactics in representation elections which no employer could legally utilize. (*See, e.g., Legislative History*, at 1018-20, 1025, 1199, 1205-09). Even the coercive use of initiation fees was mentioned as a subject for concern (*Id.* at 1205).

is no occasion for an obligation to arise which may later be forgiven. But that is a far cry from doing neither and instead offering with impunity a tangible economic benefit that cannot help but influence the minds of voters. Review by this Court is needed to restore the balance between employer and union conduct that Taft-Hartley so carefully created.[25]

It is difficult to believe that note 4 was intended to dispose definitively of the issue posed in this case. Its principal subject was whether the record before the Court established that the union's offer was, in fact, limited to the pre-election period. The Court agreed that it was so limited. Only in the last paragraph of the footnote did the Court address the Board argument that the union had a valid interest in waiving the initiation fee to overcome employer arguments, in representation campaigns, against paying dues and fees before the union had accomplished anything for the workers.[26] Even the Court's discussion of this issue

[25] We recognize that *certiorari* has been sought and denied in other cases involving the *Savair* doctrine, N.L.R.B. v. Bancroft Mfg. Co., 516 F.2d 436 (5th Cir. 1975), *cert. denied,* 44 U.S.L.W. 3467 (U.S. Feb. 23, 1976); N.L.R.B. v. Benner Glass Co., 514 F.2d 641 (5th Cir. 1975), *cert. denied,* 44 U.S.L.W. 3398 (U.S. Jan. 12, 1976); N.L.R.B. v. Wabash Transformer Corp., 509 F.2d 647 (8th Cir. 1975), *cert. denied,* 44 U.S.L.W. 3201 (U.S. Oct. 6, 1975); *see also* Thrift Drug v. N.L.R.B., 521 F.2d 243 (5th Cir. 1975), *petition for cert. filed,* 44 U.S.L.W. 3445 (U.S. Jan. 27, 1976) (No. 75-1063). In none, however, does it appear that the Court's attention was invited to the clear conflict between the legislative history of the Taft-Hartley Act and the reading that is being given to note 4.

[26] Whatever the "validity" of waivers where the employer has actually made an argument of this nature, *a fortiori,* where, as here, the employer has not made such an argument, the considerations expressed in footnote 4 do not apply and the union waiver does not serve any "valid" interest.

was qualified by the implicit assumption that such a waiver would have no effect on the union organizational campaign or on the election: the limitation imposed by the union in *Savair* was necessary "only because it served the additional purpose of affecting the union organizational campaign and the election." Thus, if it had been demonstrated to the Court that even waivers not so limited may affect elections and campaigns, the Court presumably would have found these objectionable as well. However, such waivers were not before the Court and were therefore not considered by it.

What is significant in considering the *effect* of waiver offers not limited as in *Savair* is more their timing than their terms. The nub of the matter is that pre-election offers to waive dues or initiation fees—however long they may remain open—are made with the intent of influencing an election, and cannot help but have that effect.

Note 4 as interpreted by the Board, also has given rise to an incongruous result in terms of the administration of the labor relations laws. If union organizers employ language sufficiently vague to avoid a clear implication that a waiver applies to all employees—not solely those signing before an election—the Board allows them to use this to buy both votes and authorization cards. Yet, if words of art are used which have the effect of limiting the waiver to those who sign before the election, essentially the same waiver that was lawful when extended to all is *proscribed.* The difference in an industrial context is so minuscule as to be understood and appreciated only by skilled labor lawyers. *Compare, e.g., Inland Shoe Manufacturing*

Co., Inc., 211 N.L.R.B. No. 73 (1974) (waiver of initiation fees to "charter members" of a new local *held*, proscribed by *Savair*) with *Western Refrigerator Co.*, 213 N.L.R.B. No. 40 (1974) (waiver of initiation fees for "anyone joining now during this campaign" *held*, *Savair* does not apply). The statutory policy of fair elections and freedom of choice in participation or nonparticipation in union activities should not turn on esoteric use of language.

We submit, therefore, that this Court should answer the question of whether the results generated by *Savair* were those intended by it and by the Congress in enacting the Taft-Hartley Act. It is submitted that *Savair* has not ended but, indeed has encouraged, the use of election-influencing fee and dues waivers in a pre-election context. This has upset a long and carefully established balance between permissible employer and union conduct. For these reasons, the Court should reexamine footnote 4 and the results of the post-*Savair* cases by granting *certiorari* in this case.

2. The Decision Below Is a Sharp Departure From Prior Decisions of This Court and From the Policy of the National Labor Relations Act.

The unit determination in this case squarely conflicts with firmly established precedents of this Court as to the standard to guide the Board in making unit determinations. For at least 35 years, this Court has held that the Board is bound by requirements that "the unit selected must be one to effectuate the policy of the act, the policy of efficient collective bargaining." *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 165 (1941) ("Pittsburgh Glass" hereinafter); *accord, Chemical Workers Local 1* v.

Pittsburgh Plate Glass Co., 404 U.S. 157, 172 (1971). Whether that policy will be maintained is a question of basic importance to the administration of the federal labor laws and qualifies this case for *certiorari*.

As with almost all bargaining unit determinations, the discussion must occur in a largely factual context and the extremity of the Board's decision is best demonstrated factually. Nonetheless "the Board's powers in respect of unit determinations are not without limits, and if its decision 'oversteps the law,' *Packard Co.* v. *NLRB*, 330 U.S. at 491, it must be reversed." *Chemical Workers, supra* at 171-172. The issue posed is whether approval of a tiny bargaining unit of a major segment of an industry, having many, nearly identical such units, a highly centralized and regionalized labor policy, and a strong prior history of bargaining on the basis of a far broader unit with the same union but with respect to a different class of employees—insurance agents—effectuates the policy of efficient collective bargaining established by the National Labor Relations Act.

That the decision below departs widely from *Pittsburgh Glass*[27] is illustrated by three dominant factors:

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[27] Prior to the decision in this case, the 6th Circuit followed the standard enunciated in Pittsburgh Glass and elsewhere. In N.L.R.B. v. Pinkerton's Inc., 428 F.2d 479 (6th Cir. 1970), the Court of Appeals held that the real objective of the National Labor Relations Act was to achieve stable collective bargaining, and, "if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable bargaining is undermined, rather than fostered, and could create a state of chaos rather than stable collective bargaining" (428 F.2d at 484). Prudential's argument to the Court of Appeals was based on the premise that stable collective bargaining could not occur in the unit approved by the Court. The opinion of the Court of

(1) the small size of the unit—seven district office clerical employees—compared to the size of the employer, the nation's largest insurance company and compared to the multiplicity—more than 500—of nearly identical units in size and function; (2) a highly centralized, regionalized labor policy leaving no autonomy in the manager of the approved unit in terms of the normal subjects of collective bargaining; and (3) the history of bargaining between the company and the unit with respect to another class of Prudential employees—insurance agents—in a single unit composed of those agents in 34 states and a few additional cities. The totality of the three factors, as the record below amply demonstrates, makes the decision below an extreme in conflict with *Pittsburgh Glass* and subsequent authority.

We have found no case presented to this Court in which a central legal issue has been the size of the proposed bargaining unit, either absolutely or comparatively. In the ordinary context, this is understandable for size is often irrelevant. But in a large company, such as petitioner, the extreme disproportion between the size of the unit approved by the Board and the number of field office clerical employees in a Regional Home Office—let alone the entire company—raises a fair question, standing alone, as to whether efficient collective bargaining may occur.

There are 48 district offices in the North Central Regional Home Office of Prudential. The approved unit

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Appeals distinguishes Pinkerton on minor factual grounds—the close distance between the various district offices—and does not address the issue of whether the policy of Pinkerton's—and of Pittsburgh Glass—is served or disserved by the unit determination approved by the Board.

—which covers a fraction of the employees in a district office—is but one of these. The North Central Regional Home Office is but one of *nine* such Regional Home Offices. And overall there are more than 500 Prudential district offices. Efficient collective bargaining would be difficult, if not impossible, to achieve in such a context. From the point of view of Management, certainly an effective and rational labor policy should be organized on a far broader basis. The thought of a major company being required to bargain on the basis of as many as 500 tiny units representing only seven or eight clerical employees each is plainly at odds with the objectives of the Act.

The departure from *Pittsburgh Glass* is shown also by the Board's and Court's treatment of the autonomy of the district. Both look to the question whether there was some autonomy in the district office on a day-to-day basis. Yet that is far from what *Pittsburgh Glass* demands.

The question is the autonomy of the office with respect to the subjects of collective bargaining. The testimony throughout the record is that the supervisors in the district office unit could not resolve any of the normal subjects of collective bargaining. In point of fact, the district office could not make a decision to increase a clerical employee's pay or insurance benefits, shorten work hours, promote, transfer to another office, increase vacation, waive company work rules, suspend, terminate, or change the layout of the offices. The same is true with respect to retirement and retirement benefits.

Nor does the district office set the level of employees' pay, the size of the staff, or its forms and business procedures. The resolution of all such matters is

centralized in the Regional Home Office. Regional Home Office control is also expressed through a system of manuals, telephone contacts, in-office audits and consultations and visits, and through various other liaison devices. The salient facts are that the company has prescribed centralized rules for the conduct of its business, has established a centralized system of close monitoring of district office business, and in the Regional Home Office, retains and exercises centralized authority to make all significant decisions affecting office and clerical employees.

The policy of Section 9(b) of the Act does not justify the result reached by the Board. While employee freedom to select a unit must be respected, this is only one factor to be weighed. See *Pittsburgh Glass, supra,* at 156. The Board is required to weigh—but it did not here—"the anticipated effectiveness of the unit in maintaining industrial peace through collective bargaining." (*Id.*) For where efficient, stable collective bargaining relationships are impeded by the characteristics of the unit, employee rights can be frustrated as effectively as they would be in a unit inappropriate for some other reason.

The third factor that marks the departure of the unit finding from the standard of *Pittsburgh Glass* is the history of bargaining between IWIU and Prudential, who are not strangers in any sense. This experience suggests that stable bargaining with respect to any new class of employees sought to be represented by the IWIU would be more probable in a unit larger than a single district office. Indeed the long history of effective bargaining between the two parties refutes the notion that 7 or 8 employees in a single district office constitute an appropriate unit, and raises questions—

directly relevant to the rule of *Pittsburgh Glass*—as to whether an extremely small unit can achieve the same end.

In summary, this case presents a needed opportunity to reaffirm first principles in the determination of appropriate units. Although the facts here establish the extremity of the departure from *Pittsburgh Glass,* the significance of the case is larger than its relation to a single bargaining situation. This Court should define the balance between an employer's ability to adopt a centralized labor policy and a union's desire to pursue the unit of its choosing, whatever its size. For these reasons, the Court should grant *certiorari* with respect to this issue or, if, in the Court's opinion, this issue alone does not merit such review but the first question in this petition does, the Court should grant *certiorari* on both issues to resolve the important issues of administration of the national labor relations laws presented herein.

CONCLUSION

For these reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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March 26, 1976

APPENDIX

APPENDIX A

Statutes and Executive Agreements Involved

Pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat, 519, 29 U.S.C. 151, *et seq.*), are as follows:

Section 7:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title." (29 U.S.C. § 157)

Section 8(a)(1) and 8(a)(5):

"(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." (29 U.S.C. § 158(a)(1))

• • • •

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." (29 U.S.C. § 158(a)(5))

Section 8(b)(1):

"(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." (29 U.S.C. § 158(b)(1))

Section 9(b):

"The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . ." (29 U.S.C. § 159(b))

Section 9(c)(1)(A):

"(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

* * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof." (29 U.S.C. § 159(c)(1)(A))

APPENDIX B

No. 75-1030

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

and

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO,
Intervenor.

Petition for Review of and to Set Aside a Decision and Order of the National Labor Relations Board

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Decided and Filed February 12, 1976.

Before: EDWARDS, MCCREE and MILLER, *Circuit Judges.*

EDWARDS, *Circuit Judge.* Prudential petitions to review and set aside an order of the National Labor Relations Board requiring it to bargain with the Insurance Workers International Union for a unit of office workers at its Grosse Pointe, Michigan, District Office. The Board in turn cross-petitions for enforcement of its order. The Board decision is reported at 215 N.L.R.B. No. 30.

Two issues are presented. First, Prudential contends that the single District Office bargaining unit determined

by the Board in this case is inappropriate. Prudential also argues that this court's opinion in *NLRB* v. *Pinkerton's, Inc.*, 428 F.2d 479 (6th Cir. 1970), sets standards for appropriate bargaining units which require the Board and this court to determine that, under the facts of this case, only a bargaining unit based upon Prudential's regional office encompassing 48 district offices in seven states is appropriate. On the other hand, the Board argues that the NLRB has wide discretion over determining the appropriate bargaining unit. In this regard the Board cites *NLRB* v. *Difco Laboratories, Inc.*, where this court held:

> The finding of the Board in the July representation case with regard to the appropriateness of the unit consisting of Difco's Department 35 production employees must be affirmed unless it can be said to be arbitrary or capricious or unless it violates some specific provision of the Act. See, e. g., N. L. R. B. v. Prudential Ins. Co. of America, 154 F.2d 385 (6th Cir. 1946); N. L. R. B. v. Merner Lumber and Hardware Co., 345 F.2d 770 (9th Cir. 1965), cert. denied, 382 U.S. 942, 86 S.Ct. 397, 15 L.Ed.2d 352 (1965).
>
> *NLRB* v. *Difco Labortories, Inc.*, 389 F.2d 663, 667 (6th Cir.), *cert. denied*, 393 U.S. 828 (1968).

The Board also contends that its experience in insurance company cases has led it to consider a single district office as a presumptively appropriate bargaining unit. *Equitable Life Assurance Society*, 192 N.L.R.B. 544, 545 (1971); *Metropolitan Life Insurance Co.*, 156 N.L.R.B. 1408, 1414-15, 1418 (1966); *Quaker City Life Insurance Co.*, 134 N.L.R.B. 960, 962, 138 N.L.R.B. 61, *enf'd in pertinent part*, 319 F.2d 690 (4th Cir. 1963).

The only hearing in this case concerning the appropriateness of the bargaining unit was held before a Hearing Officer in the representation proceeding. Basing his findings on that record, the Regional Director in his Decision and Direction of Election said:

> In determining the appropriateness of a single office unit in a multi-office situation the Board has repeatedly held a unit limited to a single petitioned-for location to be presumptively appropriate. *Equitable Life Assurance Society of the United States*, 192 NLRB 544. In the instant matter, I conclude that this presumption has not been overcome but, indeed, has been buttressed by the record. Thus, the Grosse Pointe District Office clerical employees are under the immediate and direct supervision of the office and district managers who control their hiring, promotions, pay raises overtime, job assignments, certain types of discipline, and who have the authority to recommend their discharges. There is minimal employee transfer,[5] between the Grosse Pointe and other offices, and there are great distances between certain district offices within the Employer's proposed unit. It is clear that the day-to-day decisions concerning a clerical employee's terms and conditions of employment are made at the district office level and that said district office maintains the substantial degree of autonomy necessary for collective bargaining to effectively function. *Equitable Life Assurance Society of the United States, supra; Firemen's Fund Insurance Company*, 173 NLRB 982, *Met-*

[5] There have been no temporary transfers of clerical employees into or out of the Grosse Pointe District Office. There have been no permanent transfers of clerical employees from the Grosse Pointe to any other district office and only two permanent transfers of clerical employees from other offices to Grosse Pointe. These two transfers were effected only after consulting the Grosse Pointe district manager. The record also contains evidence as to clerical transfers caused by a realignment of district offices apparently ordered by the North Central Regional Home Office. However, the last realignment simply resulted in the addition of two clerical employees to the Grosse Pointe office. There are no plans for additional realignments in the near future.

ropolitan Life Insurance Company, 156 NLRB 1408. I, thus, conclude that the following employees employed by the Employer share a sufficient and distinct community of interest separate from that of clerical employees in other district offices, so that they constitute a unit appropriate for the purpose of collective bargaining. *Bank of America National Trust and Savings Association,* 196 NLRB No. 76; *Empire Mutual Insurance Company,* 195 NLRB 284.

> All office clerical employees employed by the Employer at its Grosse Pointe District Office located in Harper Woods, Michigan; excluding agents, professional employees, guards and supervisors as defined in the Act.

Prudential's own managerial witness gave testimony which we read as supporting the facts found above. We recognize, of course, that Prudential argues that, in spite of this evidence of autonomy, "[r]esponsibility for and control of all significant decisions affecting the office and clerical staff is centralized in the Regional Home Office through various devices." The North Central Regional Home Office doubtless does have ultimate authority over every district office. Since, however, its authority encompasses 48 district offices in seven states, it would be an extraordinary feat to exercise that control on a day-by-day basis. We believe the Board's view that the district office has the degree of autonomy necessary for being an appropriate bargaining unit is supported by this record taken as a whole.

Prudential's reliance upon this court's majority opinion in the *Pinkerton's* case is inappropriate. There this court, in the context of a detective agency with operatives working by contract with many different plants in Ohio, found inappropriate a Board determination of a bargaining unit consisting of Pinkerton's employees in three small Ohio

towns close to the Columbus, Ohio, Regional Office of the company. The court emphasized that a lieutenant with limited authority was in charge of the employees in the bargaining unit found by the Board and that the Columbus Regional Office was "only a few miles" away—facts which obviously are not consistent with the record in the instant case.

The second issue presents a close parallel to the facts in *NLRB* v. *S & S Product Engineering Services, Inc.*, 513 F.2d 1311 (6th Cir., 1975). In *S & S Product* this court held that the union's waiver of dues for all employees up to the point when, as, and if the union succeeded in negotiating a contract with the company was "an across-the-board waiver of initiation fees to all employees of a bargaining unit [which] does not impede the free choice of the employees. . ." and that such a waiver did not contravene the Supreme Court's decision in *NLRB* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973). In distinguishing *Savair,* the Court said:

> We agree with the Board that *Savair* is distinguishable. We have said before that the waiver of initiation fees does not "in and of itself interfere with an employee's freedom of choice." NLRB v. Gafner Automotive & Machine, Inc., 400 F.2d 10, 12 (6th Cir. 1968), NLRB v. Gilmore Industries, Inc., 341 F.2d 240 (6th Cir. 1965). In *Gafner,* we upheld the Board's finding that a reduction of the initiation fee from $84 to $25 for a new group of employees was not coercive and was not improperly limited or conditioned in any way.
>
> Our reading of *Savair* suggests that the Supreme Court was concerned with the coercive impact of a waiver of fees made available only to those employees pledging their support to the union before the election. The Court explained:

> Whatever his true intentions, an employee who signs a recognition slip prior to an election is indicating to other workers that he supports the Union. His outward manifestation of support must often serve as a useful campaign tool in the Union's hands to convince other employees to vote for the Union, if only because many employees respect their co-workers' views on the unionization issue. By permitting the Union to offer to waive an initiation fee for those employees signing a recognition slip prior to the election, the Board allows the Union to buy endorsements and paint a false portrait of employee support during its election campaign.

414 U.S. at 277, 94 S.Ct. at 499.

In this case, as in *Gafner, supra,* the waiver was made applicable to all employees—not just those signing authorization cards before the election. The Supreme Court suggested, in dictum, that union interests could legitimately be served by offering the waiver to all employees.

The lower courts have recognized that promising benefits or conferring benefits before representation elections may unduly influence the representational choices of employees where the offer is not across the board to all employees but, as here, only to those who sign up prior to the election. See, *e. g.,* NLRB v. Gorbea, Perez & Morell, 328 F.2d 679, 681-682 and nn. 6-7 (CAl 1964) (promise to waive initiation fee for those joining union prior to election, but not after, may substantially influence election); Amalgamated Clothing Workers v. NLRB, 2 Cir., 345 F.2d 264, 268-269 (Friendly, J., concurring) (improper to waive fees for those joining union immediately while indicating that this is foreclosed to those joining later).

414 U.S. at 279 n. 6, 94 S.Ct. at 500.

Accordingly, we follow the rule expressed in *Gafner* and join the Fourth and Eighth Circuits in holding that an across-the-board waiver of initiation fees to all employees of a bargaining unit does not impede the free choice of employees. *See* NLRB v. Wabash Transformer Corp., 509 F.2d 647 (8th Cir. Feb. 3, 1975), NLRB v. Stone & Thomas, 502 F.2d 957 (4th Cir. 1974).

NLRB v. *S & S Product Engineering Services, Inc., supra* at 1312-13.

We believe *S & S Product* is dispositive on this issue.

Enforcement of the Board's order is granted.

APPENDIX C

MFP

215 NLRB No. 30

D—9301
Harperwoods, Mich.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 7—CA—10976

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA

and

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO

Decision and Order

Upon a charge filed on March 6, 1974, by Insurance Workers International Union, AFL-CIO, herein called the Union, and duly served on The Prudential Insurance Company of America, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 7, issued a complaint on March 12, 1974, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on December 20, 1973, following a Board election in Case 7—RC—11972 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found

appropriate;[1] and that, commencing on or about February 15, 1974, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On March 29 and June 5, 1974, respectively, Respondent filed its answer and amended answers to the complaint admitting in part, and denying in part, the allegations in the complaint.

On April 29, 1974, counsel for the General Counsel filed directly with the Board a Motion to Transfer Case to and Continue Proceedings before the Board and for Summary Judgment with attachments. On May 3, 1974, the Respondent filed an answer opposing motion to transfer case. Subsequently, on June 4, 1974, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice To Show Cause, entitled "Statement of Cause for Denial of Summary Judgment."

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

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[1] Official notice is taken of the record in the representation proceeding, Case 7—RC—11972, as the term "record" is defined in Secs. 102.68 and 102.69(f) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (C.A. 4, 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (C.A. 5, 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C. Va., 1957); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (C.A. 7, 1968); Sec. 9(d) of the NLRA.

Ruling on the Motion for Summary Judgment

In its answer and amended answer to the complaint, in its answer opposing Motion To Transfer Case, and in its response to the Notice To Show Cause Respondent attacks the appropriateness of the unit and denies the validity of the certification on the grounds that employees were offered a financial inducement in the form of a dues waiver for their support of the Union and argues that it is entitled to litigate this matter, which is newly discovered, at an evidentiary hearing. Affirmatively, it alleges that there is no evidence that a quorum of a panel of three Board Members acted upon its Request for Review in the representation proceeding. We do not accept the Respondent's position.

Our review of the record herein, including the entire record in Case 7—RC—11972, discloses that after a hearing, the Regional Director on November 16, 1973, issued a Decision and Direction of Election in which he found a unit of office clerical employees limited to the Grosse Pointe District Office to be appropriate, contrary to the broader unit urged by the Respondent. Respondent filed a Request for Review of the unit determination which was denied by the Board on the ground that it raised no substantial issues warranting review.[2] Thereafter, on December 12, 1973, an election was conducted in which the employees in the unit found to be appropriate unanimously selected the Union as their bargaining agent. Respondent did not file objections to the election. The Regional Director thereupon certified the Union on December 20, 1973.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances

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[2] We find no merit in Respondent's quorum contention as the decision denying review of the Regional Director's decision in Case 7—RC—11972 resulted from the personal participation of the Board Members and was their decision. See *KFC National Management Company*, 214 NLRB No. 29 (1974), fn. 3.

a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by the Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and the Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding.

As indicated above, the Respondent denies the validity of the Union's certification because of the Union's general practice to waive dues payments until a contract had been signed and accepted by the employees. Since it alleges that it was unaware, and reasonably could not have been aware, within the time for filing objections to the election, the Respondent argues that it is entitled to litigate this matter at an evidentiary hearing. We disagree. Although the Union's general practice to waive dues was allegedly first discovered at the hearing in another representation case, there is no showing that, with due diligence, the Respondent could not have uncovered the evidence in time to file timely objections. In any event, the objection based upon newly discovered evidence of waiver would still be subject to Section 102.69 of the Board's Rules and Regulations requiring objections to be filed within 5 days after the tally of ballots has been furnished and, therefore, the waiver objection herein would be considered untimely.[4]

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[3] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[4] *Jason/Empire, Inc.*, 212 NLRB No. 21 (1974); *Heritage Nursing Center, Inc.*, 207 NLRB No. 118 (1973).

Finally, the waiver of dues until a contract has been signed and accepted does not fall within the proscription of the Supreme Court's decision in *N.L.R.B.* v. *Savair Manufacturing Company*, 414 U.S. 270 (1973).[5] Accordingly, we shall grant the General Counsel's Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. *The Business of the Respondent*

Respondent, a New Jersey corporation with its principal office and place of business in Newark, New Jersey, is engaged in the sale and effectuation of life insurance, health, group, and annuity contracts. Respondent's Grosse Pointe District Office in Harper Woods, Michigan, is the only office involved in this proceeding. During the past year Respondent had a gross revenue in excess of $1 million, of which more than $50,000 in premiums were received at its main offices directly from States other than the State of New Jersey.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. *The Labor Organization Involved*

Insurance Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

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[5] *S & S Product Engineering Services, Inc.*, 210 NLRB No. 107 (1974).

III. *The Unfair Labor Practice*

A. *The Representation Proceeding*

1. The unit

The following employees of the Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All office clerical employees employed by the Respondent at its Grosse Pointe District Office located in Harper Woods, Michigan; excluding agents, professional employees, guards, and supervisors as defined in the Act.

2. The certification

On December 12, 1973, a majority of the employees of Respondent in said unit, in a secret ballot election conducted under the supervision of the Regional Director for Region 7, designated the Union as their representative for the purpose of collective bargaining with the Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on December 20, 1973, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about January 18, 1974, and at all times thereafter, the Union has requested the Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about February 15, 1974, and continuing at all times thereafter to date, the Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that the Respondent has, since February 15, 1974, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. *The Effect of the Unfair Labor Practices Upon Commerce*

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. *The Remedy*

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (C.A.

5, 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (C.A. 10, 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. The Prudential Insurance Company of America is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Insurance Workers International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All office clerical employees employed by the Respondent at its Grosse Pointe District Office located in Harper Woods, Michigan, excluding agents, professional employees, guards, and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since December 20, 1973, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about February 15, 1974, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that Respondent, The Prudential Insurance Company of America, Harper Woods, Michigan, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Insurance Workers International Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All office clerical employees employed by the Respondent at its Grosse Pointe District Office located in Harper Woods, Michigan, excluding agents, professional employees, guards, and supervisors as defined in the Act.

(b) In any like or related manner interferring with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all

employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its office in Harper Woods, Michigan, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 7 after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 7, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C.

EDWARD B. MILLER, Chairman
JOHN H. FANNING, Member
JOHN A. PENELLO, Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

D-9301

Appendix

Notice to Employers

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Insurance Workers International Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union as the exclusive representative of all employees in the bargaining unit described below with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All office clerical employees employed by us at our Grosse Pointe District Office located in Harper Woods, Michigan; excluding agents, professional employees, guards, and supervisors as defined in the Act.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA
(Employer)

Dated ..... By .....
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 500 Book Building, 1249 Washington Boulevard, Detroit, Michigan 48226, Telephone 313—226-3200.

APPENDIX D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

Case No. 7-RC-11972

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA
Employer

and

INSURANCE WORKERS INTERNATIONAL UNION, AFL-CIO
Petitioner

Jerome Ackerman, Esq. and *Robert Loeffler, Esq.* of Washington, D.C. for the Employer.

Isaac N. Groner, Esq., of Washington, D.C. for the Petitioner.

Decision and Direction of Election

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Michael D. Pearson, Hearing Officer of the National Labor Relations Board. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to the undersigned Regional Director.

Upon the entire record in this case, the Regional Director finds:[1]

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[1] The Petitioner and the Employer filed post-hearing briefs which have been carefully considered.

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The labor organization involved claims to represent certain employees of the Employer.

3. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

4. The Petitioner and Employer although agreeing to the composition of the unit, namely one of office clerical employees, disagrees as to the scope, with the Petitioner limiting it to the Employer's Grosse Pointe District Office,[2] and the Employer maintaining that the narrowest appropriate unit must encompass all district offices within the Employer's North Central Region. The employees in either proposed unit have undergone no collective bargaining history.

The Employer is engaged nationally in the sale of insurance. It functions administratively through nine geographically partitioned regions, including the herein involved North Central Region, with home office located in Minneapolis, Minnesota. The Grosse Pointe District Office, is one of 48 similar offices operating within the North Central Region, which are located in the States of Michigan, North Dakota, South Dakota, Nebraska, Iowa, Minnesota, and Wisconsin. Each district office is staffed by a district manager, sales manager, office manager, assistant office manager, and varying numbers of sales agents and office clerical employees. The 48 district offices within the North Central Regional Home Office are sub-grouped into 3 regions of 16 district offices, each such region being headed

[2] There are seven employees within this petitioned-for unit classifications of service assistant, service representative, and senior service representative.

by a regional director who reports to the Vice President,-Sales-District, located at Minneapolis. At the apex of the North Central regional administrative hierarchy are the Senior Vice-President and Vice-President who are also housed in Minneapolis.

The North Central Regional Home Office also maintains an Administration Division, headed by the Vice-President-Administration, which supplies support services to the district offices, including office lease arrangements, purchase of office equipment, maintenance of personnel data, and payroll preparation. The Administration Division employs field office consultants who are assigned to a specific group of field (district) offices. These consultants visit each office approximately once a year and are principally engaged in advising the office of new or altered clerical procedures, and in correcting procedures that are not being performed in accordance with the Employer's national manual pertaining to office clerical functions. The field office consultant is not an in-line supervisor of any district office personnel.

The district office is the Employer's basic field unit for dealing with the public. It is under the immediate supervision of the district manager. The district manager's responsibility relative to clerical functions is defined as ". . . . the district supervision of the clerks in the office, their training, disciplining, hiring," and ". . . the total responsibility for the operation of the district agencies. . ." The district manager, however, devotes an overwhelming majority of his time to sales functions and, hence, delegates most of his responsibilities vis-a-vis clericals to the district office's office manager.

The office manager operating under the superintending control of and reporting directly to the district manager, interviews job applicants and effectively determines who

will be hired,[3] determines which clerical employees will be promoted or granted pay raises,[4] issues job assignments to clerical employees, and determines who will work overtime. Additionally, the office manager possesses the authority to orally reprimand a clerical employee, to schedule their vacations and lunch hours, and to grant permission to any clerical employee to either report to work late or leave work early. The record also indicates that some disciplinary actions against clerical employees may be carried out at the district office level, although a disciplinary discharge requires the prior approval of the North Central Regional Home Office. The office manager and district manager also have the authority to settle or adjust employee grievances and complaints at the local level and only those problems not resolved in the district are considered at the regional level.

The Employer's national home office formulates on an overall basis such personnel matters as wage guidelines, fringe benefit programs and employee work standards. Each regional home office establishes its regional personnel policies within these national guidelines thereby assuring a great degree of national uniformity while also allowing for regional peculiarities. Thus, certain regions have slight-

[3] After a decision has been reached to hire any clerical employees, all job applicant interviews are effected at the district office level; only the approved candidate's name is transmitted to the North Central Regional Home Office whereat the recommendation receives ready approval. A recommendation for hire has never been rejected by the Home Office.

[4] The office manager completes a personnel rating form immediately prior to an employee's six month anniversary date on the job and must submit at that time a recommendation as to whether or not the employee should be granted a six month pay raise. The recommendation is, in effect, the actual personnel determination, as it is not reviewed by any other non-district personnel. All other pay raises or promotions involving district office non-supervisory personnel originate at the district office through recommendations of the district or office manager.

ly different fringe benefits than other regions. In addition, each region establishes a district office's clerical pay scale within one of five different national ranges depending on factors such as size of city, local cost of living picture, competitive wages in the area, etc. District offices contribute to such Regional office decision making process; they have, on occasion, recommended that the clerical pay scale of a particular office be raised to a higher classification.

In determining the appropriateness of a single office unit in a multi-office situation the Board has repeatedly held a unit limited to a single petitioned-for location to be presumptively appropriate. *Equitable Life Assurance Society of the United States,* 192 NLRB 544. In the instant matter, I conclude that this presumption has not been overcome but, indeed, has been buttressed by the record. Thus, the Grosse Pointe District Office clerical employees are under the immediate and direct supervision of the office and district managers who control their hiring, promotions, pay raises, overtime, job assignments, certain types of discipline, and who have the authority to recommend their discharges. There is minimal employee transfer,[5] between the Grosse Pointe and other offices, and there are great distances between certain district offices within the Employer's proposed unit.[6] It is clear that the day-to-

[5] There have been no temporary transfers of clerical employees into or out of the Grosse Pointe District Office. There have been no permanent transfers of clerical employees from the Grosse Pointe to any other district office and only two permanent transfers of clerical employees from other offices to Grosse Pointe. These two transfers were effected only after consulting the Grosse Pointe district manager. The record also contains evidence as to clerical transfers caused by a realignment of district offices apparently ordered by the North Central Regional Home Office. However, the last realignment simply resulted in the addition of two clerical employees to the Grosse Pointe office. There are no plans for additional realignments in the near future.

[6] e.g. The Grosse Pointe office and a district office in North Dakota.

day decisions concerning a clerical employee's terms and conditions of employment are made at the district office level and that said district office maintains the substantial degree of autonomy necessary for collective bargaining to effectively function. *Equitable Life Assurance Society of the United States, supra; Firemen's Fund Insurance Company,* 173 NLRB 982, *Metropolitan Life Insurance Company,* 156 NLRB 1408. I, thus, conclude that the following employees employed by the Employer share a sufficient and distinct community of interest separate from that of clerical employees in other district offices, so that they constitute a unit appropriate for the purpose of collective bargaining. *Bank of America National Trust and Savings Association,* 196 NLRB No. 76; *Empire Mutual Insurance Company,* 195 NLRB 284.

> All office clerical employees employed by the Employer at its Grosse Pointe District Office located in Harper Woods, Michigan; excluding agents, professional employees, guards and supervisors as defined in the Act.[7]

Direction of Election

An election by secret ballot will be conducted by the Regional Director among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations.[8] Eligible to vote are those in the

[7] As discussed *supra* the record disclosed that the sales manager, district manager and office manager have the authority to hire and promote employees and to make assignments of work using independent judgment. In addition, the assistant office manager frequently assumes and shares the duties of the office manager. Under these circumstances I conclude that these managers and office managers are supervisors within the meaning of the Act and they accordingly are excluded from the unit and not eligible to vote in the election ordered herein.

[8] Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed

unit who were employed during the payroll period immediately preceding the date below, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period and employees engaged in a strike who have been discharged for cause since the commencement thereof, and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[9] Those

with the Board in Washington, D.C. This request must be received by the Board in Washington, D.C., by November 29, 1973.

[9] In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear Inc.*, 156 NLRB 1236; *N.L.R.B.* v. *Wyman-Gordon Company,* 394 U.S. 759. Accordingly, it is hereby directed that an election eligibility list, containing the names and addresses of all the eligible voters, must be filed by the Employer with the Regional Director within seven (7) days of the date of this Decision and Director of Election. The Regional Director shall make the list, 2 copies of which are requested, available to all parties to the election. In order to be timely filed, such a list must be received in the Regional Office, 500 Book Building, 1249 Washington Boulevard, Detroit, Michigan 48226, on or before November 23, 1973. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by Insurance Workers International Union, AFL-CIO.

/s/ BERNARD GOTTFRIED
Bernard Gottfried, Regional Director
for the Seventh Region
NATIONAL LABOR RELATIONS BOARD
500 Book Building
1249 Washington Boulevard
Detroit, Michigan

(SEAL)

Dated November 16, 1973
at Detroit, Michigan

No. 75-1376

In the Supreme Court of the United States

OCTOBER TERM, 1975

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

ROBERT H. BORK,
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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-11a) is reported at 529 F.2d 66. The Board's decision and order (Pet. App. 13a-24a) is reported at 215 NLRB No. 30. The decision and direction of election by the Regional Director in the related representation case is set forth at Pet. App. 25a-32a.

JURISDICTION

The judgment of the court of appeals was entered on February 12, 1976. The petition for a writ of certiorari was filed on March 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board properly found that the union's unconditional offer to all unit employees to waive initiation fees and dues until after a collective bargaining agreement was negotiated and ratified did not warrant setting aside the representation election.

2. Whether the Board abused its discretion in determining that employees in the company's district office constituted a separate bargaining unit.

STATUTES INVOLVED

Pertinent provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*, are set forth at Pet. App. 1a-3a.

STATEMENT

1. In 1973, the Insurance Workers International Union, AFL-CIO (the Union) filed a representation petition with the Board, seeking certification as bargaining representative for office clerical employees at the Grosse Pointe, Michigan, district office of The Prudential Insurance Company of America (the Company). The Company opposed the petition, contending that the district office was an inappropriate bargaining unit and that the bargaining unit should include all employees in its North Central Region, encompassing 48 district offices in seven states (Pet. App. 26a). After an evidentiary hearing, the Board's Regional Director found that the Company's

basic unit of operations was its district office,[1] and that the Grosse Pointe district office was relatively autonomous.[2] Accordingly, the Regional Director concluded that the bargaining unit sought by the Union was appropriate. The Board denied the Company's request for review of the Director's decision (A. 1).

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[1]In particular, the Regional Director found that the Company administers its nationwide insurance operations through nine regional home offices. Its North Central Region comprises 48 district offices in Michigan, North and South Dakota, Nebraska, Iowa, Minnesota, and Wisconsin; the North Central Regional Home Office is located in Minneapolis. (Pet. App. 26a; A. 67-69, 254. "A." references are to the printed appendix to the briefs in the court of appeals, a copy of which we have lodged with the Clerk of this Court.) The district offices sell and service insurance policies within distinct geographic areas (Pet. App. 27a; A. 146, 151-152). Each district office has responsibility for the "training, disciplining [and] hiring * * *" of its clerical employees (Pet. App. 27a; A. 110). The district office determines whether the employees should work overtime, it schedules their lunch hours and vacations, and it adjusts their individual working hours (Pet. App. 27a-28a; A. 74-75, 95, 104-105, 133-134, 186, 204, 226-227). In addition, the district office is responsible for evaluating the employees' performances; it reprimands and disciplines them and recommends discharges when necessary (Pet. App. 27a-28a; A. 78, 110-111, 198-199, 218-219). Grievances and complaints are ordinarily settled at the district level (Pet. App. 28a; A. 93-94, 148, 223-224). While wages, fringe benefits, vacations, and work standards are based upon guidelines which are formulated by the corporate home office and adjusted by the regional home offices, the district office can recommend that employees be placed on a higher pay scale (Pet. App. 28a-29a; A. 76-77, 88-90, 131, 149), and it initially decides upon promotions and wage increases (Pet. App. 28a, n. 4; A. 86-88, 96, 104-105, 163, 183).

[2]In particular, the record shows that the Grosse Pointe office is located 10 miles from any other district office (A. 229). Moreover, there is no significant interchange of employees between Grosse Pointe and other district offices; out of 300 clerical employees in North Central Region's district offices, only about 20 transfer annually and few transfer temporarily (Pet. App. 29a; A. 107, 156-157, 255-257). The Grosse Pointe office's geographical boundaries have remained stable. In 1972, for the first time in 5 years, a boundary adjustment resulted in the gain of one clerical employee (Pet. App. 29a, n. 5; A. 120, 159-161).

2. The Union unanimously won the ensuing representation election and was certified. The Company thereafter refused to bargain with the Union (Pet. App. 13a-14a). In the subsequent unfair labor practice proceeding, the Company contended that the bargaining unit was inappropriate, and that "newly discovered evidence" showed that the Union interfered with the conduct of the election by offering to waive its dues and fees until a collective bargaining agreement was negotiated and ratified (Pet. App. 15a, 17a). The Board rejected these contentions, noting that the Union's offer to all employees to waive dues and fees did not contravene *National Labor Relations Board* v. *Savair Manufacturing Co.*, 414 U.S. 270 (Pet. App. 16a-17a).[3] Finding that the Company's refusal to bargain therefore violated Section 8(a)(5) and (1) of the Act, the Board entered a bargaining order (Pet. App. 21a-22a).

3. The Company sought review in the court of appeals, contending that the Board's order should be set aside because the bargaining unit was inappropriate and because the Union's offer to waive dues and fees impermissibly interfered with the election. The court of appeals enforced the Board's order, concluding, *inter alia*, that "the Board's view that the district office has the degree of autonomy necessary for being an appropriate bargaining unit is supported by this record taken as a whole" (Pet. App. 8a) and that the Union's offer to all employees to waive dues and initiation fees until a collective bargaining agreement had been signed did not contravene *Savair, supra* (Pet. App. 9a-10a).

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[3]In *Savair, supra*, this Court held that a union's offer to waive initiation fees *only* of employees who sign authorization cards prior to an election impermissibly interferes with the employees' right to refrain from union activities and their statutory right to a free and fair election (*id.* at 277).

ARGUMENT

1. Contrary to the Company's contention, the decision below does not conflict with *National Labor Relations Board* v. *Savair Manufacturing Co., supra.* There, this Court noted that the union's legitimate interest in waiving initiation fees could be preserved without election interference if the waiver were made available to all employees who join "the union before an election [and] also to those who join after the election." 414 U.S. at 272-274, n. 4. Here, it is undisputed that the Union's offer to waive dues and fees until a collective bargaining agreement had been negotiated and ratified was made to all employees.

Unlike a pre-election offer limited to employees who support the union, an unconditional waiver to all employees does not "allow the union to buy endorsements and paint a false portrait of employee support during its election campaign" (414 U.S. at 277). Employees who vote against the union benefit from the initial waiver of fees and dues equally with those who vote for the union. And, unlike a pre-election offer by an employer, who is in a position to alter terms and conditions of employment in anticipation of an election and thereby directly interfere with his employees' free choice, the union's offer necessarily is contingent on events it does not control; if it loses the election or fails to negotiate and ratify a collective bargaining agreement, it will have no power to impose monetary obligations on any unit employee.[4]

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[4]Accordingly, every court of appeals that has ruled on the question has held that a union's unconditional offer to waive fees and dues, not predicated on pre-election support, does not impermissibly interfere with an election and therefore is not prohibited by *Savair, supra.* See, *e.g., National Labor Relations Board* v. *Wabash Transformer Corp.*, 509 F.2d 647, 649-650 (C.A. 8), certiorari denied, 423 U.S. 827; *Altman Camera Co., Inc.* v. *National Labor Relations*

2. The Company also contends that the Board abused its discretion in limiting the bargaining unit to employees in the Company's district office. Section 9(b) of the Act authorizes the Board to decide "in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."[5] Under settled principles, a single district office in the insurance industry is presumptively an appropriate bargaining unit.[6] This presumption was not

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Board, 511 F.2d 319, 322 (C.A. 7); *National Labor Relations Board* v. *S & S Product Engineering Services, Inc.*, 513 F.2d 1311, 1312-1313 (C.A. 6); *National Labor Relations Board* v. *Benner Glass Co.*, 514 F.2d 641, 642 (C.A. 5), certiorari denied, No. 75-654, January 12, 1976; *National Labor Relations Board* v. *Stone & Thomas*, 502 F.2d 957, 958 (C.A. 4); *National Labor Relations Board* v. *Dunkirk Motor Inn*, 524 F.2d 663, 665 (C.A. 2); *Thrift Drug* v. *National Labor Relations Board*, 521 F.2d 243 (C.A. 5), certiorari denied, No. 75-1063, April 5, 1976.

[5]In view of this broad authority, the finding that a particular unit is appropriate will not be set aside unless the Board has acted arbitrarily (*Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485, 491-492), or has failed clearly to articulate the basis for its determination (*National Labor Relations Board* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 442-443).

[6]See, *e.g.*, *Michigan Hospital Service Corp.* v. *National Labor Relations Board*, 472 F.2d 293 (C.A. 6); *Continental Insurance Co.* v. *National Labor Relations Board*, 409 F.2d 727 (C.A. 2), certiorari denied, 396 U.S. 902; *National Labor Relations Board* v. *American Life & Accident Insurance Co.*, 394 F.2d 616 (C.A. 6), certiorari denied, 393 U.S. 913; *National Labor Relations Board* v. *Western & Southern Life Insurance Company*, 391 F.2d 119 (C.A. 3), certiorari denied, 393 U.S. 978; *Metropolitan Life Insurance Co.*, 156 NLRB 1408; *Quaker City Life Insurance Co.*, 134 NLRB 960, 138 NLRB 61, enforced, 319 F.2d 690 (C.A. 4). The application of this presumption to units of clerical employees in district offices is also settled. See *Empire Mutual Insurance Co.*, 195 NLRB 284; *Equitable Life Assurance Society*, 192 NLRB 544; *Fireman's Fund Insurance Co.*, 173 NLRB 982.

rebutted in the instant case since the Board found that the Grosse Pointe district office "maintains the substantial degree of autonomy necessary for collective bargaining to effectively function" (Pet. App. 30a). As shown above (pp. 2-3), the record adequately supports this finding.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1976.

DOJ-1976-05

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1376

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD

and

INSURANCE WORKERS INTERNATIONAL UNION,
AFL-CIO, *Respondents.*

Brief for Respondent Insurance Workers International Union, AFL-CIO, in Opposition to Petition for a Writ of Certiorari

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COUNTERSTATEMENT OF QUESTION PRESENTED

The only question presented is whether upon this particular record, the National Labor Relations Board ("Board") acted within its statutory authority and discretion in (1) finding appropriate a bargaining unit legally indistinguishable from units which had been invariably held appropriate in the past, and (2) concluding that a Board representation election and

certification are not vitiated, and Petitioner's refusal to bargain collectively in good faith was not justified, by a Union statement that the employees would have no obligation to pay Union dues and initiation fees unless and until the Union would have negotiated a collective bargaining agreement with the employer.

ARGUMENT

THE PETITION SHOULD BE DENIED BECAUSE THE JUDGMENT BELOW RESTS UPON THE UNIQUE FACTS OF THIS PARTICULAR CASE AND PRESENTS NOTHING MERITING REVIEW BY THIS COURT.

I. The Decisions Below That This Specific Bargaining Unit Is Appropriate Rest on the Unique Facts of This Particular Case.

This Petition ("Pet.") seeks review by this Court of one particular finding of appropriate bargaining unit by the Board, sustained unanimously by the Court below. Obviously, as the Petition itself recognizes, the discussion of a finding of appropriate bargaining unit "must occur in a largely factual context" (Pet. 27). The particular facts upon which the Board principally relied—and the Petition does not question the adequacy of the particular record in demonstrating those facts—appear in the Decision of the Regional Director (Pet. 26a-30a). In unanimously affirming the Board's finding of appropriate bargaining unit, the Court below expressly relied upon those facts (Pet. 5a-9a).

To capsulize, the bargaining unit found appropriate in this case is that of all the Petitioner's office clerical employees at its Grosse Pointe, Michigan District Office. The record amply demonstrates the principal facts upon which the decisions below relied: The

Grosse Pointe District Office is a separate and distinct geographic entity in Petitioner's operations; it operates with significant autonomy as a separate and distinct administrative entity in Petitioner's operations with respect particularly to the office clerical employees involved in this particular case; Petitioner's District Offices are the basic units of Petitioner's operations which deal with its actual and potential customers and the public; and the District Office is a separate and distinct administrative entity, with its own functions, powers and management, in Petitioner's organization and administration of its business. When such facts are shown upon the record of a particular case, the decision has invariably been to the effect that such a unit is appropriate, with respect to clerical and related employees and the insurance industry in particular, as well as employees subject to the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* ("Act") in general. Exemplifying such decisions are *Continental Insurance Co.* v. *N.L.R.B.*, 409 F.2d 727 (2nd Cir. 1969), *cert. denied*, 396 U.S. 902 (1969); *N.L.R.B.* v. *Western and Southern Life Insurance Company*, 391 F.2d 119 (3rd Cir. 1968), *cert. denied*, 393 U.S. 978 (1968); *N.L.R.B.* v. *Quaker City Life Ins. Co.*, 319 F.2d 690 (4th Cir. 1963); *State Farm Mutual Automobile Ins. Co.* v. *N.L.R.B.*, 411 F.2d 356 (7th Cir. 1969), *cert. denied*, 396 U.S. 832 (1969); *Empire Mutual Insurance Co.*, 195 NLRB 284 (1972); *Equitable Life Assurance Society of the United States*, 192 NLRB 544 (1971); *Fireman's Fund Insurance Co.* 173 NLRB 982 (1968).

There is no more to this case than a Board determination of an appropriate bargaining unit upon one

specific case record, a finding legally indistinguishable from numerous findings in the same industry and other anologous circumstances—a finding plainly within the range of discretion afforded the Board, and plainly not arbitrary or capricious. It is small wonder that Petitioner must acknowledge that no one has previously had the temerity to present to this Court the particular complaint about an appropriate bargaining unit upon which this particular Petition is founded: "We have found no case presented to this Court in which the central legal issue has been the size of the proposed unit, either absolutely or comparatively" (Pet. 28). There is nothing in that circumscribed, particularized question which warrants consideration by this Court.

II. The Decision on Lack of Obligation To Pay Union Dues or Initiation Fees Until A Collective Bargaining Agreement Is Executed Is Admittedly Consistent With This Court's Decision in Savair and With All Pertinent Decisions.

In *N.L.R.B.* v. *Savair Manufacturing Co.*, 414 U.S. 270 (1973) ("*Savair*"), this Court drew a clear line between waivers of dues and initiation fees offered only to those employees who signed Union cards *prior* to the Board representation election and such waivers offered without regard to the date of the Board representation election. While this Court held that the former were inappropriate during a Board election campaign, it expressly recognized that "unions have a valid interest in waiving the initiation fee when the union has not yet been chosen as a bargaining representative," an interest which "can be preserved as well by waiver of initiation fees available not only to those who have signed up with the union before an

election but also to those who join after the election." *Id.* at 274, n. 4, final paragraph.[1]

Unquestionably, the alleged Union statements in this case were not bound to the date of the Board representation election, but were to the effect that the employees would not be asked to pay the Union initiation fees and dues unless and until a collective bargaining agreement was executed therafter (Pet. 19).[2] In holding that the claimed Union conduct in this case therefore did not justify setting aside the results of the Board representation election and did not justify Petitioner's refusal to bargain with the Union, the decisions below were faithful to the teaching of this Court in *Savair*.

Petitioner does not contend otherwise; it requests that "the Court should reexamine" the legal principles it set out in *Savair* (Pet. 26). Explicitly Petitioner acknowledges that the decisions below are consistent with many other Court of Appeals and Board decisions

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[1] The Court continued, "The limitation imposed by the union in this case—to those joining before the election—is necessary only because it serves the additional purpose of affecting the Union organizational campaign and the election." The Court itself added the emphasis in directing attention to the fact that the question accepted for review in *Savair* was "whether the 'Board properly concluded that a union's offer to waive initiation fees for all employees who sign union authorization cards *before a Board representation election*, if the union wins the election, does not tend to interfere with employee free choice in the election.'" *Id.* at initial paragraph.

[2] This is taking Petitioner's allegations as true; there was no evidentiary record on this issue which was plainly an afterthought (Pet. 4, n.5). Even if there were some *Savair* issue which would theoretically justify consideration by this Court, therefore, this case would not be an appropriate vehicle for such consideration because of the lack of factual record on this issue.

(Pet. 18-26). Petitioner recognizes in addition that a number of petitions for writs of certiorari have already sought to have this Court review issues purportedly arising from *Savair;* and such petitions have been uniformly denied (Pet. 24, n. 25). Plainly, this case provides no occasion for any further discussion of legal principles which were clearly explicated in *Savair,* and have produced no confusion or conflict, but rather consistency and clarity of Board and judicial decision.

CONCLUSION

The judgment below rests on the unique facts of this particular case. It is admittedly in accord with all judicial and administrative authority which relates to either the appropriate bargaining unit or the initiation fee-dues waiver issue. *A fortiori,* there is no conflict among the Circuits.

There is no good reason for granting the Petition. There is every good reason for denying it summarily, so that the collective bargaining which has been so long delayed may at last commence; and the individual employees within this particular appropriate bargaining unit may finally enjoy the individual rights safeguarded for them in the Act.

Respectfully submitted,

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